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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

PAUL JONES AUGUSTIN,

Defendant and Appellant.

E047642

(Super.Ct.No. RIF143359)

OPINION

APPEAL from the Superior Court of Riverside County. Roger A. Luebs, Judge.

Affirmed with directions.

Susan S. Bauguess, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Meagan Beale and Marilyn L. George, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Paul Jones Augustin appeals after he was convicted of several counts of assault with a deadly weapon (using several different weapons),

corporal injury to a spouse and false imprisonment. He contends that the trial court erred in imposing concurrent sentences on count 5 (assault with a deadly weapon, a knife, and by means of force likely to cause great bodily injury) (Pen. Code, § 245, subd. (a)(1));<sup>1</sup> count 7 (assault by means of force likely to cause great bodily injury) (§ 245, subd. (a)(1)); and count 8 (false imprisonment) (§ 236). The People contend that defendant was properly sentenced on these counts. We agree with defendant as to count 5, but agree with the People as to counts 7 and 8. We remand for correction of the sentencing error, but otherwise affirm the judgment.

#### FACTS AND PROCEDURAL HISTORY

The charges arose out of several incidents of alleged domestic violence that took place on January 15, 2008, January 31, 2008, March 24, 2008, and April 2, 2008.

On January 15, 2008, defendant was asleep or passed-out on the couch in the living room of the home he shared with his wife and their son. Several liquor bottles stood on the table near defendant. Defendant's wife, the victim, came downstairs after putting their son to bed, and saw defendant lying on the couch. She could smell the alcohol on him. She went into the kitchen to wash dishes. The couple had been having marital problems; they had separated in October 2007, but defendant had returned home recently, in December 2007. Glancing from time to time at defendant sprawled on the couch, the victim was overcome emotionally; she slumped to the floor near the pantry and cried. Defendant awoke, came into the kitchen, began kicking the victim in the hip,

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

and told her to stop crying. The victim was upset to see defendant “like that,” and she was disappointed, for their son looked up to defendant. Defendant grabbed a bread knife and put it next to the victim’s neck. Defendant demanded that the victim stop crying, saying she was being too “dramatic.” He told her that she “was not suppose to be crying in any way.” Defendant gripped the victim’s arm so tightly that when she moved even slightly, the knife blade cut the side of her face. When the victim saw the blood on the blade, she began to cry harder. Defendant said it was the victim’s fault, and shoved the knife into the pantry door, making a hole in the door with the handle. The victim went upstairs and locked herself in the master bedroom.

On January 31, 2008, defendant and the victim argued over finances. When defendant became angry, the victim did not want to continue the argument. She turned away and started to go upstairs. Defendant threw a pair of kitchen shears at her, which sailed past her shoulder and struck the wall.

On the morning of March 24, 2008, defendant and the victim argued again. Defendant grabbed the victim by the hair and slammed her head on the floor. The victim struggled to get away. Defendant released her and went into the kitchen. Fearing that defendant was going to get a knife, the victim grabbed the telephone and ran upstairs. As she tried to dial 911, defendant caught the victim by the leg and tried to wrest the phone from her hand. Defendant had a steak knife in his hand. The victim said he tried to stab her in the throat. Then, defendant was able to pull the victim back down the stairs. During the struggle, he also bit her on the shoulder.

After this argument, the victim took the couple's son to school, and then went to the police station to make a report. She told the officers that she did not want defendant arrested, but merely sought to memorialize a report of her injuries.

The last incident took place on April 2, 2008. Defendant and the victim had another argument over finances. Defendant yelled at the victim and then went into the kitchen, where he began rummaging through drawers, apparently looking for something. Frightened, the victim ran upstairs and locked herself in the son's bedroom. Defendant broke down the door and entered the room, holding a large serving fork in his hand. He grabbed the victim by the hair, pushed her to the floor, and banged her head on the floor several times. Defendant became emotional and began to cry. During this lull in the attack, the victim ran away into the master bathroom and again locked herself in. Defendant broke down this door as well, and again grabbed the victim by the hair, shoving her down. The victim did not remember anything more about the attack in the bathroom.

The next thing the victim remembered was being in the garage with her son. She was attempting to get into the car to get away, but defendant snatched the car keys from her hand and threw them away. Defendant ordered the victim and their son to return to the living room, and to sit on the couch. The victim remembered defendant pushing them into the living room; that was when defendant hit their son. Sitting on the couch, the victim did not feel free to leave. If she or the son tried to move, defendant would stop them.

The couple's 10-year-old son testified at trial. He stated that he had seen defendant frequently punch, kick and bite the victim. On the morning of April 2, 2008, the son remembered being awakened by sounds of his parents' altercation. He went downstairs and saw defendant on top of the victim, kicking and punching her. When defendant stopped and picked up a large fork, the victim got away and ran upstairs, locking herself in the son's room. Defendant chased after her. The son tried to stop defendant, but defendant shoved him aside and proceeded to break down the bedroom door. Defendant was beating the victim again. The victim got away and ran into the bathroom. Defendant broke down that door as well. The son saw defendant shoving the victim's head in the toilet.

The son's memory blurred for a bit after that, but he remembered being in the garage with his mother, trying to leave. Defendant became enraged because he heard a siren and accused them of calling the police. Before the victim could get into the car, defendant grabbed her by the legs and dragged her back into the house. The son followed his parents into the house and saw the victim sitting on the couch. Fearing that defendant was going to hit his mother again, the son intervened; defendant jabbed the son in the head and in the stomach. The son sat with his mother on the couch. He did not want to leave his mother's side.

Defendant's version of events was somewhat different. Defendant denied ever hitting the victim or his son. He testified, rather, that the victim was the one who often attacked him, scratching him or digging her nails into his arm. Defendant acknowledged that the victim was upset because of their financial problems and defendant's alleged

extramarital affair. The victim had expressed suicidal ideas, threatening to kill herself by driving the car off a mountain or down a ravine.

As to the events of January 15, 2008, defendant denied assaulting the victim with a knife, and he denied jamming the knife through the pantry door.

Another time, the victim threatened to kill herself because of their marital problems. Defendant remonstrated with her to consider their son. The victim replied that she did not care; in frustration, defendant picked up some kitchen shears and threw them, but no one was nearby.

On March 24, 2008, defendant and the victim argued in the kitchen. The victim attacked defendant, scratching his face. Defendant took the phone away from the victim because he feared she would call his place of employment and try to get him fired, by accusing him of having an affair with a coworker. Defendant did not think that the victim was calling 911.

Defendant also denied attacking the victim with a fork on April 2, 2008. He admitted breaking down the doors to the bathroom and the son's bedroom, but he did so because he feared that the victim was suicidal and would harm herself. Defendant testified that the victim was banging her own head against the floor or the wall as she cried. Later, in the garage, the victim became calmer and agreed to come inside and talk. Defendant admitted he may have "poked" their son and told him where to sit, but he denied striking his son. Defendant did admit hitting the sofa out of frustration.

Out of the four incidents arose several criminal charges. With respect to the events of January 15, 2008, defendant was charged in count 1 with assault with a deadly

weapon (bread knife) (§ 245, subd. (a)(1)), and in count 2 with corporal injury to a spouse (cut with bread knife), with the allegation of personally using a deadly weapon in the commission of the offense (§§ 273.5, subd. (a), 12022, subd. (b)(1), 1192.7, subd. (c)).

Defendant was charged in count 3 with assault with a deadly weapon (kitchen shears) on January 31, 2008.

The incidents of March 24, 2008, gave rise to the charges in count 4, corporal injury to a spouse (§ 273.5, subd. (a)), and count 5, assault with a deadly weapon (steak knife) (§ 245, subd. (a)(1)).

The events of April 2, 2008, resulted in the charges of assault with a deadly weapon (serving fork) in count 6, and assault with force likely to produce great bodily injury in count 7 (§ 245, subd. (a)(1), as to both). Defendant was charged in count 8 with false imprisonment by violence and menace (§ 236), and in count 9 with infliction of pain and suffering on a child (§ 273a, subd. (a)).

After the close of the prosecution's evidence, the court granted the defense motion under section 1118.1 as to count 9; the court stated it would instruct the jury on a lesser included offense of misdemeanor child endangerment (§ 273a, subd. (b)).

Defendant was acquitted on count 2 (spousal abuse, cutting with the bread knife), the only charge that included an allegation that defendant had personally used a deadly weapon. Otherwise, the jury found defendant guilty of all the remaining charges, including the misdemeanor child endangerment offense with respect to count 9. The trial court deemed count 4 (corporal injury to a spouse arising on March 24, 2008) the

principal term, and sentenced defendant to the middle term of three years. The trial court imposed concurrent terms on all of the remaining convictions, resulting in a total prison commitment of three years.

Defendant now appeals, asserting that the trial court erred in failing to stay the sentences as to counts 5, 7 and 8.

## ANALYSIS

### I. The Claim Is Not Waived

Defendant contends that his sentence was improper as to counts 5, 7 and 8. That is, count 5 (assault with a deadly weapon with the steak knife) took place on the same date (March 24, 2008) as the offense in count 4 (corporal injury to a spouse), and was part of an indivisible course of conduct, for which he should not suffer multiple punishments under section 654. Similarly, the offenses in count 7 (assault with force likely to cause great bodily injury) and count 8 (false imprisonment by threat of force or violence) were part of the same course of conduct on the same date (April 2, 2008) as count 6 (assault with a deadly weapon with the serving fork), and thus should have been stayed under section 654.

The People contend that defendant has waived or forfeited the claim because no objection was raised below. For example, the court announced that it believed all the crimes were discrete, and posed no problem under section 654, but offered counsel an opportunity to comment. Defendant's counsel argued for probation, but did not remark upon the court's section 654 analysis. At the close of the prosecutor's argument for consecutive sentencing, the court again offered defense counsel an opportunity to argue.



Counsel reiterated his earlier comments that defendant had no prior record, and asked that justice be tempered with mercy. The court imposed concurrent, rather than consecutive sentences as requested by the prosecutor; defense counsel did not object, and did not raise any issue of section 654.

The People argue that the failure to raise the matter below forfeits the claim on appeal. (Citing *People v. Gonzalez* (2003) 31 Cal.4th 745, 748; *People v. Scott* (1994) 9 Cal.4th 331, 358.) The People suggest that trial counsel made a tactical decision not to object, because the court had imposed concurrent rather than consecutive terms.

Defendant's appellate counsel responds that, despite the failure to object, the imposition of a prison term, even a concurrent term, in violation of section 654 is an unauthorized sentence beyond the jurisdiction of the trial court to impose, and thus is subject to correction on appeal even in the absence of an objection below. (*People v. Scott, supra*, 9 Cal.4th at p. 354, fn. 17.) Defendant's total sentence—three years—may not be affected by the imposition or staying of sentence on the questioned counts. Nevertheless, he argues, imposing concurrent sentences in violation of section 654 cannot be presumed nonprejudicial, because other sentencing statutes might operate to defendant's detriment in unforeseen ways. (See *In re Wright* (1967) 65 Cal.2d 650, 654; see also *People v. Pearson* (1986) 42 Cal.3d 351, 361.) We thus agree with defendant that the issue is not waived, despite the failure to object.

## II. The Sentence as to Count 5 Must Be Stayed

We next examine the merits of defendant's contention. “Section 654 precludes multiple punishments for a single act or indivisible course of conduct punishable under

more than one criminal statute. Whether a course of conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the “intent and objective” of the actor. [Citation.] If all of the offenses are incident to one objective, the court may punish the defendant for any one of the offenses, but not more than one. [Citation.] If, however, the defendant had multiple or simultaneous objectives, independent of and not merely incidental to each other, the defendant may be punished for each violation committed in pursuit of each objective even though the violations share common acts or were parts of an otherwise indivisible course of conduct. [Citation.]’ [Citation.]” (*People v. Hairston* (2009) 174 Cal.App.4th 231, 240.) Whether section 654 applies in any given instance is a question of fact; the court is vested with broad discretion in determining this question. (*People v. Hutchins* (2001) 90 Cal.App.4th 1308, 1312.) “In conducting the substantial evidence analysis we view the facts in the following fashion: ‘We must “view the evidence in a light most favorable to the respondent and presume in support of the order the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]” [Citation.]’ [Citations.]” (*People v. Garcia* (2008) 167 Cal.App.4th 1550, 1564-1565.)

The key issue here, therefore, is whether defendant had multiple or independent objectives, notwithstanding that the particular counts took place on the same date as other offenses. We review the trial court’s determinations deferentially.

Defendant contends that count 4 (corporal injury) and count 5 (assaulting the victim) constituted an indivisible course of action with only one objective: that is, defendant both bit the victim and stabbed at her with the steak knife, to prevent her from

telephoning for help. The People argue, however, that count 4, corporal injury, could be based upon more than the biting incident alone: “The main flaw in this argument is that [defendant] fails to mention how [he] slammed [the victim’s] head onto the floor *before* he went into the kitchen to get the knife. . . . [¶] . . . Here, viewing the finding in the light most favorable to the judgment leads to the conclusion that the trial court based Count 4 on slamming [the victim’s] head on the floor, dragging [her] down the stairs and biting her, and based Count 5 on his attempt to stab [the victim] in the throat with the steak knife.”

At trial, however, the prosecutor clearly treated count 4 as being based upon defendant’s biting the victim’s shoulder, and argued the matter so to the jury. Both the knife attack and the biting on March 24, 2008, took place in the struggle on the stairs, and occurred while the victim had been attempting to use the telephone. Factually, both the attempted stabbing with the steak knife and the bite to the victim’s shoulder took place at the same location, as part of the same struggle. Both appeared to be part and parcel of a single objective, to overcome the victim and prevent her from reporting defendant, whether to police or to his employer. Thus, sentence on count 5 should have been stayed.

Count 7 (assault with force likely to cause great bodily injury) and count 8 (false imprisonment) took place on the same date as count 6 (assault with a deadly weapon, i.e., the fork). The People again argue that the trial court could properly find section 654 was not applicable. This time, we agree with the People. The assault with the fork (count 6) took place in the son’s bedroom. Defendant broke down the door to the bedroom, entered with the fork, grabbed the victim by the hair, and slammed her head to the floor

several times before he was overcome with emotion and began crying. That portion of the attack ceased. The victim seized the opportunity to seek refuge in the locked bathroom. By then, defendant had discarded the fork. He could have desisted, but instead chose to renew the conflict by breaking down yet another door, and tried to shove the victim's head into the toilet. Count 7 was thus independent from the charges in count 6. The false imprisonment charge, count 8, was based on the events that took place beginning in the garage. Neither the victim nor the son remembered clearly how they got to the garage, but the time frame clearly was after the attack on the victim in the bathroom. The victim was attempting to leave with her son in the car. Defendant grabbed and threw away the car keys, and then prodded both the victim and the son back into the house, where he required them to sit on the sofa. Defendant intervened to prevent them from moving from the couch. Preventing the victim and the son from leaving was factually different, and served a different objective, from the earlier attacks in the bedroom and bathroom. We agree with the People's assessment that defendant harbored different intents at each stage of the events of April 2, 2008: as to count 6, the facts support the conclusion that defendant's purpose was "to physically harm [the victim]." Count 7 took place after an interval, which permitted time for reflection (see *People v. Andra* (2007) 156 Cal.App.4th 638, 640-641); defendant also harbored additional intents, such as, "at least in part, to degrade and humiliate [the victim]." Count 8 took place after yet another interval, and had a wholly different purpose not present with respect to counts 6 and 7, i.e., to prevent the victim and the son from leaving. Substantial evidence supports the trial court's determination that counts 7 and 8 were

divisible from count 6. (*People v. Monarrez* (1998) 66 Cal.App.4th 710, 713 [a defendant's intent and objective present factual questions for the trial court, and its findings will be upheld if supported by substantial evidence].) The trial court therefore properly imposed concurrent sentences with respect to counts 7 and 8.

#### DISPOSITION

The matter is remanded to the trial court with directions to stay the sentence for count 5 under section 654, and to amend the abstract of judgment accordingly. The trial court is further directed to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

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/s/ McKINSTER

J.

We concur:

/s/ RAMIREZ

P.J.

/s/ RICHLI

J.